No. 11383

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES STROM and FLORA STROM, husband and wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT VF THE UNITED STATES

BRIEF OF PETITIONERS

L. L. THOMPSON
L. B. DONLEY
Attorneys for Petitioners
Address: 1410-24 Puget Sound Bank Building
Tacoma, Washington

Ray Printing Co.—Tacoma

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES CITED—Continued

AUTHORITIES

STATUTES

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES STROM and FLORA STROM, husband and wife,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONERS

JURISDICTION

This is a petition for review of a decision of the Tax Court of the United States which sustained the action of the respondent commissioner in imposing income taxes in the amount of $169.67 against petitioners for the year 1941. Jurisdiction rests upon the provisions of Title 26 U.S.C.A. Sec. 1141. The entire income sought thus to be taxed arose out of the sale by petitioners, who are incompetent Indians and members of the Quinault Indian Tribe and who reside in the Western District of Washington, of salmon caught by them within the boundaries of the Quinault Indian Res-

ervation. The return in question was made in the office of the Commissioner in the Western District of Washington. By appropriate stipulation it was agreed that the case could be reviewed by this Court (Tr. page 40). Such sales were consummated within the boundaries of said Indian reservation, and the fish were sold by petitioners to buyers in their natural state without being in any way processed. The imposition of the tax is resisted, among other things, upon the ground that it violates the provisions of the Treaty of July 1, 1855, and January 25, 1856, between the United States and the Quinault and other Indian tribes (12 Stat. at Large, page 987). The important portions of this Treaty were summarized by the Supreme Court of the United States in the case of Halbert vs. United States, 283 U. S. 753, 75 Law Ed. 1389, from which an extended quotation will be hereafter made. To save repetition such summary is not stated here.

STATEMENT OF THE CASE

The Government introduced no evidence in the case. Most of the facts were stipulated to in writing, although petitioners introduced some oral evidence which was not contradicted by the Government.

1. There is attached hereto as an appendix to this brief such written stipulation of facts, which stipulation is made a part of this brief at this point by reference.

2. In addition to the stipulated facts, the evidence shows that in the year 1923 the members of the Quinaielt Tribe were informed by the then local Indian Agent who had jurisdiction of their affairs that income taxes were required to be paid upon the net proceeds of the sale of fish caught by the members of the tribe in the waters of the Quinault River and within the boundaries of the Quinaielt Reservation in the year 1922. The evidence further shows that in some instances the taxes were so paid by some Indians (Tr. page 51). It further shows that soon thereafter and in the same year, the said Indian Agent at a meeting of the members of the tribe at Taholah, which is a town within the Indian Reservation, informed the members of the tribe that taxes upon this type of income were not required to be paid, and that thereafter no returns were made or taxes paid on the proceeds of the sale of fish thus caught by any of the members of the tribe, and that no demand was made upon the members of the tribe by either the Bureau of Internal Revenue or the Indian Department to pay such taxes until 1943 when, for the first time, demand was made upon the members of the tribe to pay income taxes on the net proceeds of fish caught in the year 1941 (Tr. page 51).

3. The evidence shows that the run of fish in this river is extremely variable and that there was

sometimes an interval of as high as nine years between good commercial runs (Tr. pages 55, 58). It further shows that there was a very light run in 1943 and practically nothing in 1944 (Tr. page 56).

4. There was introduced in evidence photostatic copies of certain governmental files taken in the Bureau of Archives at Washington, D. C., relating to the negotiations of the treaty referred to in the stipulation of facts. These documents, taken with other facts of which the court may take judicial notice, petitioners contend will show this treaty should be construed to prohibit the imposition of this tax. Inasmuch as these documents will be referred to in detail in the argument which follows, no resume of their contents will here be made. They appear on pages 59 to 83, inclusive, of the Transcript of Record.

SPECIFICATIONS OF ERROR

Petitioners assert that the tax court of the United States in this proceeding erred in the following particulars:

1. In holding that the provisions of the general statutes of the United States, providing generally for a tax upon net income, apply to and cover the income herein involved, that is to say, income arising from the sale of fish caught and sold by the

taxpayers in the Quinault Indian Reservation, under the facts and circumstances shown by the record.

2. In holding that under the provision of the Treaty of July 1, 1855, between the United States and the Quinault and other Indian Tribes, the Government of the United States had the right to levy an income tax upon income of this character.

3. In failing to construe said Treaty liberally and in accordance with the understanding as to its meaning originally agreed to between the representatives of the United States and of said Tribe at the time the Treaty was made.

4. In holding that this Treaty did not create a vested right in the petitioners to take these fish and sell them free from taxation, which could not be taken away under the provisions of the Fifth Amendment to the Constitution of the United States the protection of which is hereby invoked by petitioners.

5. In refusing to hold that on account of relations between the Government and these Indians that the Government, by its conduct during the period from 1923 to 1943, acting through the Department of Indian Affairs and the Office of the Attorney General and the Bureau of Internal Revenue, was not precluded in equity and justice from seeking to collect this tax.

6. In refusing to hold in any event that the sale of this fish by petitioners should be regarded as a sale of a capital asset without gain, and therefore not subject to a tax.

7. In entering a deficiency judgment against the petitioners for income taxes for the year 1941 in the sum of $169.67, or in any sum whatsoever.

ARGUMENT

The foregoing specifications of error, to a considerable extent overlap and each point cannot, therefore, be separately considered without tedious repetition. For the purpose of argument, these points may be divided into the following general subdivisions:

(1) The effect of the treaty; (2) the proper construction of the Internal Revenue Act, even if the treaty be held to be not directly applicable; (3) the question of whether, in view of the peculiar facts and circumstances, the sale of this fish should not be deemed the sale of a capital asset; and (4) the question of whether the Government is not precluded in equity and good conscience from seeking to collect taxes upon the proceeds of the sale of fish caught previous to 1943.

The Treaty Precludes the Collection of This Tax

It is stipulated that petitioners were and now are members of the Quinaielt Indian Tribe. If the treaty is constructed generally to prohibit the imposition of the tax here involved, then the appeal must be sustained. Before discussing the specific provisions of the treaty, it is well to consider the historical facts which gave rise to the execution of the treaty by representatives of the tribe and Governor Isaac I. Stevens, then Governor and Superintendent of Indian Affairs of the Territory of Washington. The general geographical situation is to some extent set forth in the stipulated facts. A more complete description of the circumstances which caused the treaty to be signed, and the relationship between members of the tribe and the Government is set forth by the Supreme Court of the United States in the case of *Halbert v. United States*, 283 U. S. 753; 75 Law Ed. 1389, of which facts this court may refresh its recollection by reference to this decision. That case will be referred to in a later portion of this brief in more detail. For the present, it is sufficient to say that it involved a question of the construction of the identical treaty here involved, in another connection. In describing the general situation, the Supreme Court said:

> "In 1855, the Quinaielt, Quillehute (also called Quiloute), Chehalis, Chinook, and Cow-

litz Indians were neighboring tribes in the southwesterly section of what is now the State of Washington. They were all known as 'fish-eating Indians' and lived in small villages adjacent to the Pacific coast and the lower reaches of the Columbia River. The Quits and Ozettes were also fish-eating tribes living in coast villages a little north of the others, the Ozettes being farther north than the Quits.

"During the early part of 1855 negotiations were had between a representative of the United States and representatives of the Quinaielt, Quillehute, Chehalis, Chinook, Cowlitz, and Quit tribes looking towards a cession by these tribes of much territory and their consolidation within a single reservation. These negotiations failed of their full purpose, but resulted in a treaty between the United States and the Quinaielts and Quillehutes which was signed on July 1, 1855 and January 25, 1856. By this treaty the Quinaielts and Quillehutes ceded a large district to the United States, and the latter engaged to reserve for their use and occupancy a tract 'sufficient for their wants,' to which when established they were to remove. There were also provisions in the treaty securing to the Indians the right of taking fish 'at all usual and accustomed grounds and stations', in common with all citizens of that section, and of erecting temporary houses to be used in that connection; authorizing the President, at his discretion, to survey the whole or any part of the reserved lands and assign the same to such individuals or families 'as are willing to avail themselves of the privilege and will locate on the same as a permanent home;' and consenting that the

President might 'consolidate' the Quinaielts and Quillehutes and 'other friendly tribes,' whenever in his opinion, the public interest and the welfare of the Indians would be promoted by it.

"Under the treaty a reservation of about 10,000 acres at the mouth of the Quinaielt river was provisionally selected and its boundaries surveyed. Some years later the local superintendent reported that the reservation, by reason of being small and containing but a small amount of agricultural and pasture lands, had proved unattractive to the Indians; that the Chehalis, Chinook, and other coastal tribes in southwestern Washington, like the Quinaielts and Quillehutes, who were parties to the treaty, were all 'emphatically fish-eaters,' drawing their subsistence almost wholly from the water, and that all of these fish-eating tribes should be collected on a single reservation, including suitable fisheries. To that end he recommended that the existing reservation be greatly enlarged and designated the territory which he believed should be included in it. This recommendation led to an order of November 4, 1873, by the President, the material parts of which are as follows:

> 'In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856, and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington territory . . . be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, . . . '

> "This enlarged reservation contained about 200,000 acres and included the prior provisional reservation of 10,000 acres."

The significant things to be borne in mind from this recital are that the members of this tribe, previous to and on the date of the execution of the treaty were to a considerable extent dependent for their subsistence upon the taking of fish, and that no facilities were made by the treaty to give them opportunity to engage in agriculture or to follow any other occupation which would afford them subsistence.

The case of *Tulee v. Washington*, 315 US 681, 86 L. Ed. 1115, involved a treaty negotiated by Governor Stevens with the Walla Walla and Yakima Indians, who resided east of the Cascade Range in the State of Washington. This treaty was signed on June 15, 1855 (12 Stat. at Large 971), and in general contained substantially the same provisions as were included in the Quinaielt Treaty, as we shall hereafter show.

In an effort to ascertain the circumstances under which these two treaties, in almost the same language, were negotiated within three weeks of each other in different parts of the territory, petitioners procured from the Department of Archives at Washington, D. C., photostatic copies of the offi-

cial record of the Department of the Interior concerning the negotiation of this treaty. The first document which was introduced was a letter from Charles Mix, then acting Commissioner of Indian Affairs under the Interior Department, dated August 30, 1854, and addressed to Governor Isaac Stevens, who had his headquarters in Olympia, Washington Territory, and who was also Commissioner of Indian Affairs in the Territory under the Interior Department (Trans. p. 63). This letter is too long to be set forth in detail. It begins by reciting the fact that Congress, by the Act of July 31, 1854, had appropriated $45,000.00 for the purpose of negotiating treaties with all the Indian tribes in the Territory of Washington, and that the sum of $10,000.00 had been assigned by the Indian Department for the use of Governor Stevens in the course of these negotiations. This money was directed by the communication to be used by Governor Stevens "for expenses of negotiating treaties with and making presents of goods and provisions to Indian tribes in the Territory of Washington". The letter then advised Governor Stevens that goods in the sum of $20,000.00 would be shipped in a fast clipper ship to Olympia and to Vancouver, Washington, to be used by Governor Stevens in the course of his negotiations. The letter then gave to Governor Stevens authority to agree to give annual amounts

to the Indians with the thrifty suggestion, however, "that the stipulations to be fulfilled annually on the part of the United States be few in number, and that the department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at their time of payment may require. The letter then refers to various treaties which had theretofore been entered into with other Indian tribes, enclosing copies thereof, and made certain suggestions with respect to the treaties to be negotiated by Governor Stevens, but concluded "with these general views, you will nevertheless exercise a sound discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached." The advice was probably good, but the suggestion might be made that possibly the members of the tribe should have had somebody present to protect them from future approach by the Treasury of the United States.

Without reviewing this communication further, it may be stated that Governor Stevens was given $30,000.00, which sum included the salaries and expenses of representatives of the Government to secure a cessation by the Indians of their claim to

the entire Washington Territory, and that Governor Stevens successfully secured this with the allotted sum. The material significance of this, insofar as the proper construction of the treaty is concerned, is that it shows that one of the impelling and important considerations which induced the Indians to sign the treaty was the recognition in Article III of the treaty that their fishing rights would in no wise be impaired.

Governor Stevens apparently undertook this task with energy and efficiency, because the records show that on December 21, 1854, he wrote to the Commissioner of Indian Affairs in Washington, D. C., reporting the action which he had taken (Trans. p. 69). In this letter he reported that he had organized a commission to treat with the Indians. The letter then continued: "It is proposed to proceed at once to hold Treaties with the Tribes West of the Cascade Mountains, upon Puget Sound and the Coast. Mr. M. T. Simmons, Special Agent for this District, has already been some days among the Indians in this vicinity, gathering them together and *I shall proceed next week to hold a Treaty with them;* Then continue down the Sound, taking the Tribes as they are collected; thence across to the Pacific Coast, and thence up the Columbia River."

Other than this recital by Governor Stevens, the

records do not definitely show what, if any, direct contacts Governor Stevens actually had with the Indians who resided west of the Cascade Mountains. Apparently, however, Governor Stevens did attend a council of these tribes at Grays Harbor sometime previous to March 25, 1855, because there is included in the records a letter from Governor Stevens to Col. M. T. Simmons, Special Indian Agent, and dated March 25, 1855, at Olympia (Trans. p. 72) in which letter Governor Stevens authorized Col. Simmons to negotiate treaties with substantially all of the Indians on the west side of the Cascades, including "the Indians brought into council at Grays Harbor". Grays Harbor is about fifty miles from the Quinault River and undoubtedly the Quinaielt Tribe attended this council. Apparently shortly thereafter Governor Stevens proceeded to the Walla Walla country, as he had indicated that he would in his letter of December 21, 1854, because Petitioners' Exhibit 6 is a copy of a letter dated June 18, 1855, at the council ground at Walla Walla, addressed to Col. Simmons and signed by Governor Stevens (Trans. p. 77). This letter first states that "the expenditures in effecting treaties this side of the Cascades much exceed all calculations". The significant portion of the letter, however, is the following statement to Col. Simmons: "I hope you will succeed in getting the Tribes

parties to the Grays Harbor Council to sign the programmed treaty *which was drawn up just before I left Olympia.*" It is a reasonable assumption from the record, therefore, that Governor Stevens attended the Grays Harbor Council, discussed the situation with the Indians, then returned to Olympia, which is only some seventy miles from Grays Harbor, drew up this treaty, and left it with Col. Simmons for final signature by the Indians.

This finds full support in a report dated September 30, 1855, addressed to Governor Stevens by Col. Simmons (Trans. p. 80). It will be noted that this report is incomplete. However, while it bears no signature, on the first page it is labeled "report of agent M. T. Simmons". Referring to the Quinaielt Treaty, Agent Simmons stated: "The Kwinaielt River is a handsome river, some thirty feet wide, is navigable for canoes about thirty miles to a large lake, the finest of salmon abound here." It might be observed that this is the identical river and the identical salmon involved in this proceeding.

The report then recites that he made a treaty with the Quinaielt Tribe and that the "proceedings of the treaty you will please find attached to my report". Unfortunately, the report is incomplete, and with it the proceedings leading up to the treaty. Insofar as this treaty is concerned, he then con-

cluded with the statement that "the presents being most agreeably accepted by them, have found the men all with large knives in their hands, but all very friendly". We are not informed as to the particular presents which were thus distributed, but this seems to make it clear that the taking of what Col. Simmons refers to as "the finest of salmon" was a most important part of the negotiations.

The only two other documents which are of importance are a letter dated August 30, 1855, written at Fort Benton in the Idaho country by Governor Stevens to Col. Simmons (Trans. p. 79), and a letter written from Olympia dated May 25, 1856, by Governor Stevens to George W. Maypenny, Commissioner of Indian Affairs (Trans. 83). In his letter to Col. Simmons, Governor Stevens directed Col. Simmons in his annual report to "include the tribes present at the Grays Harbor Council." This letter also stated that "the conference with Indians incident to the treaties will have their place more properly in an official journal, copies of which will accompany my report transmitting the treaties". In his letter of May 25, 1856, to the Commissioner of Indian Affairs, Governor Stevens enclosed the treaty with the Quinaielts, and states that in the report of Col. Simmons, which was also transmitted, "reference is made to the council held with these tribes". The letter then continues: "*The program*

of the treaty was prepared by me previous to my leaving for the Blackfoot country, and the treaty itself was signed by me after my return". From this statement the conclusion is almost unavoidable that all of the preliminary negotiations leading up to the final signing of the treaty by the members of the various tribes were personally conducted by Governor Stevens at the Grays Harbor council.

It may seem to the court that the foregoing discussion is foreign to the issues involved in this appeal. We think that these facts are material, (1) because by these documents there is clearly revealed the fact that these treaties were negotiated as a part of a general negotiation personally conducted by Governor Stevens with all the Indian tribes in the State of Washington, including the Yakimas, to which treaty we shall presently refer, and (2) because, in order to interpret this treaty for the benefit of the Indians and as they understood it (Tulee v. Washington, supra) this history is material and of much significance.

We come now to the treaty with the Yakimas and other eastern tribes. As we have shown, after the Grays Harbor council had been held by Governor Stevens, he then caused to be drawn up and left with Col. Simmons the treaty involved in this proceeding, and thereafter departed for a similar

council and action, if possible, on the Walla Walla council grounds in Eastern Washington. This council eventuated in the Treaty of June 8, 1855, with the Yakimas and other eastern tribes (12 Stat. at Large, 951). This treaty is set forth almost in its entirety in the decision of the United States Supreme Court in *United States v. Winans*, 198 U. S. 371; 49 Law Ed. 1089. It is sufficient to say that it is almost identical with the Quinaielt Treaty and that Article III of the treaty with the Yakimas is, with a difference hereinafter set forth, an exact copy of Article III of the present treaty. Unlike the proceedings of the Grays Harbor council, a complete record of proceedings with the Walla Walla council was made and is on file with the National Archives in Washington, D. C.

The case of *Tulee v. Washington*, supra, was an appeal from the decision of the State Supreme Court in *State v. Tulee*, 7 Wash. (2d) 124; 109 Pac. (2d) 280. The defendant in that case in the State Court was represented by the Assistant District Attorney of the United States at Spokane, Washington, and also by a special solicitor from the Department of the Interior. As is shown in the opinion of the case, the Government introduced in evidence the record of the proceedings of the Walla Walla council, which record was referred to, although not quoted from, by the Supreme Court in *Tulee v. Washington*, supra.

We shall hereafter discuss the Tulee case with more particularity. For the present, we merely refer to the decision in the State Court in order to show the proceedings had at the Walla Walla council. The case was decided by the State Court adversely to the Indians, but three judges dissented, and Justice Simpson, the dissenting judge, sets forth in his dissenting opinion the following excerpts from the proceedings of the Walla Walla council:

> "Among other things, Governor Stevens told the Indians,
>
> 'We have near to our hearts the property of the Indians and the propositions to be made to you will prove it.'

Speaking of the tracts to be retained by the Indians, he said:

> "On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers, we want you and your children to learn to make ploughs, to learn to make wagons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.
>
> 'Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew,

and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics; besides this we want on each tract a saw mill and a grist mill.'

"At another time, he made the following statement concerning the care which the government would exercise in order to help the Indians:

'I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we *do* do it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.'

"Again, he stated:

'If we make a Treaty with you and our Great Chief and his Council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.'

"Governor Stevens made a definite state relative to the Indian's right to fish in the following words:

'*There is plenty of salmon on these reservations*, there are roots and berries. There is also some game.. You will be near the Great Road and can take your horses and your cattle down

the river and to the Sound to market . . .

'You will be allowed to go to the usual places *and fish* in common with the whites . . . together with all outside the reservation.

'In the paper for the Yakimas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swanwap-um and Palouse, the Yakimas and all the bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and *fishing stations*, which they well know and which I understand is satisfactory . . .

'You will not be called according to the paper to move on the reservation for two or three years; then *is secured to you your right to fish*, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physicians and other things we have promised are secured; then the salaries, the houses and the 10-acre farms of your chiefs are secured to him . . .

'I will ask of Looking Glass whether he has been told of our Council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, *that he can catch fish at any of the fishing stations . . .*' "

These, then, were the facts and circumstances which caused these Indians to surrender to the United States their ancestral rights which they had enjoyed for centuries and beyond the period of any

recorded history. They surrendered these rights for not to exceed $45,000.00 and for the solemn promise of Governor Stevens that in any event the right of fishing upon which their very existences depended would never be impaired. In the light of this history, can it be said that it was understood by Governor Stevens or contemplated by the Indians that the treaty was intended to give to the Government the power to impose a minimum tax of 20% on the net proceeds of the sale of fish caught on a small reservation to which the Indians were compelled to remove. On principle, it would seem that there is but one answer to this: the right of these Indians to take fish was reserved without qualification and with emphasis by the Indians, and this right was definitely protected from the encroachments of anyone, including the Government of the United States.

The treaty with the Yakimas has been three times before the Supreme Court of the United States, and the present treaty has been twice examined by that tribunal. The three cases which involved the treaty with the Yakimas involved the fishing rights of the Indians and are, of course, directly applicable to the treaty with the Quinaielts, since, as we have shown, the language of the two treaties is almost identical. We propose now to examine these decisions.

United States v. Winans, 198 U. S. 371; 49 Law Ed. 1089, was an action brought by the United States for the benefit of certain members of the Yakima Indian Tribe to enjoin the defendant, the holder of a fixed appliance fishing license on the Columbia River, from preventing the members of the tribe from fishing at certain usual and accustomed places then occupied by a fishing wheel owned and operated by the defendant under a license from the State of Washington. The complaint was predicated upon the quoted provisions of the treaty. It was contended by the defendant that since the only right given by the treaty was the right to fish at all usual and accustomed places outside of the reservation *in common with the citizens of the territory*, that the Indians had no right to fish at locations previosuly pre-empted by white persons under applicable provisions of local law. This contention was denied by the Supreme Court in the following language:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights, had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Ind-

ians, but a grant of rights from them, -- a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places', and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land, -- the right of crossing it to the river, -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty, and the *right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.*"

This case, then, definitely establishes the proposition that the fishing rights given by this treaty, whatever they are, apply to the United States to the same extent as they do to the State. This means

that, insofar as the power of taxation is concerned, if a state could not impose a tax upon the exercise of the right thus reserved, then neither could the Government.

The case is also of importance for another reason. The argument was made by the defendant that since the whites had superior capacity to devise and make use of fishing instrumentalities such as the fishing wheel, and since if a fishing wheel was used, this would physically operate to exclude the Indians from the location, then the treaty should be construed in the light of changed conditions. The court did not agree with this argument. It called attention to the fact that even if the taking of fish by white men could not be confined to a spear or crude net, that "it does not follow that they may construct and use a device which gives them exclusive possession of the fishing place". The court then made this observation: "The argument based on the inferiority of the Indian is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess." It may be contended that because commercial fishing in that day was not known, that consequently an imposition imposed upon the proceeds of the sale of fish should be considered as not prohibited by the treaty. This theory, if advanced, is sufficiently

answered by the quotation from the Winans case above referred to.

The fishing provision of this treaty was again considered by the United States Supreme Court in *Seufert Brothers v. United States*, 249 U. S. 194; 63 Law Ed. 555, in which case it was held that despite the technical language used in the treaty, members of the Yakima tribe had the right to fish on the Oregon side of the Columbia River and in the country of another tribe. The case is of importance here only to the extent that the act reiterates with added emphasis the rule of construction announced in the Winans case. After quoting the excerpt from the Winans case, heretofore quoted by us, and after pointing out that the understanding of the Indians was in accordance with the conditions made by the Government, the court concluded:

> "To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right of 'taking fish at all usual and accustomed places and of erecting temporary buildings for curing them,' and would substitute for the natural meaning of the expression used -- for the meaning which it is proved the Indians, for more than fifty years, derived from it -- the artificial meaning which might be given to it by the law and by lawyers."

So we say here that the artificial meaning given by the Bureau of Internal Revenue and its solicitor to this treaty is a substitute for the natural meaning which here, as in the Seufert Brothers case, should contral.

The next and last case in which the Supreme Court has had occasion to construe the fishing clause of this treaty is *Tulee v. Washington*, 315 U. S. 681; 86 Law Ed. 1115, which case we submit is absolutely controlling here. That case originated in a criminal prosecution by the State of Washington against a member of the Yakima Indian Tribe for fishing in the waters of the Columbia River at a usual and accustomed place with a net, without first securing from the State a license and paying therefor an annual license fee of $5.00. As we have noted, the defendant was represented in this case by the Department of Justice. The State Supreme Court, by a divided court, sustained a conviction of the defendant, and an appeal was taken to the Supreme Court of the United States. The decision of the State court was reversed for the reason that the imposition of this tax was held to be in conflict with the fishing rights reserved by the Indians in the treaty. The court said:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will

bear. In *United States v. Winans,* 198 U. S. 371, 49 Led 1089, 25 S Ct 662, this court held that, despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond these which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co. v. United States,* 249 U. S. 194, 63 L ed 555, 39 S Ct 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States v. Kagama,* 118 U. S. 375, 384, 30 L ed 228, 231, 6 S Ct 1109; *Seufert Bros. Co. v. United States,* supra (249 US 198, 199, 63 L ed 558, 559, 39 S Ct. 203).

"Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for 'the support of the state government and its existing public institutions.' Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing.

> But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a pre-requisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case."

We have quoted from this decision in almost its entirety for the reason that it seems to us to determine entirely the question. We desire particularly to direct the court's attention to the statement made by the court that "from the report set out in the record before us of the proceedings at the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in *accordance with the immemorial customs of their tribes*". This is the report quoted from in the dissenting opinion of Justice Simpson in the State court. It is true that this report is not in this record, but this makes no difference. The Supreme Court of the United States has based its decision in part upon it and it is binding on this court. Also, we desire to emphasize the statement of the Supreme

Court that it is the responsibility of the court "to see that the terms of the treaty are carried out as far as possible, *in accordance with the meaning they were understood to have by the tribal representatives at the council* and in a spirit which generously recognizes the first obligation of this nation to protect the interests of a dependent people".

If, as the court said, the desire of the Indians was the right to fish in accordance with previous customs, and if it is the responsibility of the court to say that the treaty is carried out in accordance with that understanding, then certainly the right to tax this income should be denied. The taking of fish by the Indians from time immemorial was certainly not subject to the right vested in any white person or nation to impose a tax thereon. The treaty preserves that right, and certainly it cannot be said that it is in any way impossible to exempt from the right to impose income taxes, this small segment of the national income.

We have already shown that it is no answer to this to assert that the taking of fish is the only right protected, and that the right of sale was subject to the same Governmental rights as in the case of white persons with whom no treaty had been made, as did the Tax Court in its rather casual opinion. The right to take the fish of necessity involves the right to dispose of the fish when taken. Doubtless,

the Indians had on occasions bartered fish with fur traders and white settlers. We think the records of the pioneers of the Pacific Northwest will show many instances of such commercial transactions. Be that as it may, however, the treaty contained no limitations upon the exercise of dominion and control over the fish by the Indians when they were taken. To impute into the treaty a distinction between fish caught for home consumption and fish caught for sale is to place in the treaty a limitation not found there, and to controvert the statement in the Winans case that "the treaty was not a grant of rights to the Indians, but a grant of rights from them, -- a reservation of things not granted".

When the treaty was signed, the Indians had the right to catch the fish and sell them. When they reserved the right to take the fish, then certainly under any rule of construction, there went with that reservation the right to dispose of the fish. The Tulee case holds that this right cannot be subject to a charge attempted to be imposed by the State of Washington, partially for purposes of revenue and partially in the exercise of police power. The Winans case holds that the United States is subject to the same limitations as the State. Indeed, the violation of the treaty here is much more apparent and clear than in the Winans case. In the Tulee case the exaction complained of was nominal

in amount, was, in part at least, a part of the exercise by the State of its right under the police power to conserve the fish, and involved fish caught beyond the boundaries of the Reservation. Here, the exaction is substantial. There is no pretense of the exercise of the police power, but the action taken by the Government is avowedly for the purpose of raising revenues. It has been said that "the power to tax is the power to destroy". This axiom has been rather well demonstrated by recent decisions of the Supreme Court of the United States which have even justified treble taxation. If the Government may impose an income tax of 20%, it can impose one of 50% or 60%, with the net result that finally the fish can only be taken for home consumption, and even that may be made subject to a use tax.

In the foregoing discussion we have not overlooked the fact that these three cases involved the right to fish at usual and accustomed places beyond the borders of the Indian Reservation; neither do we overlook the fact that the treaty with the Yakimas specifically provided that the Indians had "the exclusive right of taking fish in all of the streams where running through or bordering said reservation," whereas this provision is not found in Article III of the present treaty. The reason for this probably was that in the case of the Yakimas, Article III specifically described the Reservation area,

whereas Article III of the Quinaielt treaty reserved for the use and occupation of the Indians, lands to be thereafter selected by executive order of the President. Since there was no specific reservation described in the Quinaielt treaty, the reservation of the right to fish at all usual and accustomed places was sufficient. It may be suggested, also, that Article III had the same effect as the provision in the Yakima treaty, because Article III provided that when the Reservation was selected, it should be "set apart for their exclusive use, and no white men shall be permitted to reside thereon without permission of the tribe and of the Superintendent of Indian Affairs or Indian Agent". The reservation of exclusive right of taking fish set out in the Yakima treaty. Such was the conclusion of District Judge Cushman of the Western District of Washington, who sat upon the District Court in this area for over a quarter of a century and was well-versed in Indian law, in the case of *Mason v. Sams*, 5 Fed. (2d) 255. We think, therefore, that the difference in language between the two treaties is a matter of no consequence and that the Tulee case is equally applicable to the Quinaielt treaty.

The only other reported decision which we have found which construes the fishing clause of these treaties is the case of *Mason v. Sams*, supra, which case is squarely in point on principle, although

perhaps not on the facts. That was an action brought in equity by members of the Quinaielt tribe to enjoin one Sams, who was then Indian Superintendent of the tribe, from enforcing certain rules and regulations regulating the taking of fish in the Quinaielt River which had been promulgated by the Department of the Interior. This regulation prohibited fishing in certain portions of the channel and with certain kinds of gear, and to a limited extent required fish to be taken personally by the owners of such fishing locations. Other regulations were made which are not too applicable here. The one concerning which the main complaint in the case was made, was a regulation which provided that all members of the tribe should be required to sell their fish to buyers licensed by the Department of the Interior, and that each licensed buyer should withhold from the gross proceeds of fish sold to him by members of the tribe, a graduated royalty which ranged from 5% on receipts from $500.00 to $1,000.00, up to 25% on receipts over $3,000.00. The regulation further provided that this money should be remitted to the Department of the Interior and used for the care of the aged and destitute members of the tribe when authorized by Congress, or for other general agency purposes. It should be noted that Section 463 of the Revised Statutes authorized the Secretary of the Interior to make rules and regulations governing the Indians,

so there was not involved in the case any question of general executive authority to make regulations. These royalty provisions of the regulations were attacked by the plaintiff upon the ground that they violated Articles II and III of the treaty. The court first referred to the Winans and Seufert cases, supra, then compared the differences in language of the two treaties and held that the Quinaielt treaty should be construed as giving the exclusive right to fish upon the Reservation to members of the tribe. In the course of this conclusion, the court said that it took "judicial knowledge of the fact that at the time of making the treaty these Indians were particularly dependent for a living upon fishing—more so than were the Yakimas or any of the plains Indians," and it was thought by the court that this was so obvious to the framers of the treaty that this "may have been the reason that no express provision was made for exclusive rights upon the reservation."

The court then discussed the treaty in the following language:

> "Under Articles II and III of this treaty the right to take fish was in the individual Indian —as much so as the right to pick berries, to gather roots, to hunt, or to pasture his ponies upon the open and unclaimed lands. The treaty can mean no less. Its language—and a comman knowledge of the Indian's way of life—

render it plain that the Indians must have understood by this treaty substantially as found by the court."

After quoting from the Seufert case, the court continued:

"No intention is shown, nor implication warranted, that the Indian who fished should pay, from his fishing, the Indian who did not care to fish but chose, rather, to hunt, pick berries, gather roots, or run his ponies upon the public domain. It may be that in a case of tribal lands, or other property in excess of those required by individual members of the tribe, a different rule would obtain; but in the present suit it appears that part of the trouble is that there is not enough set-net locations to go around. The inconvenience arising from such a condition does not warrant a warped interpretation of the treaty. There are less arbitrary ways of meeting such a situation.

"Clubs of limited membership have a waiting list; upon a crowded golf course, players await their turn; the whole belongs to the one whose harpoon first strikes him. There is no analogy in this matter between the power of the government, and the authority of the state over the fish in its streams. The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. But the fish in the waters of this stream do not belong to the state, nor to the United States; *but to the Indians of this reservation.*"

This case, we submit, is also squarely in point.

These regulations in effect placed a graduated gross income tax upon the income of the Indians which accrued from the taking of this fish. The fact that the proceeds were to be used for agency purposes or for the support of destitute members of the tribe would not differentiate the case from the one here involved. The question before the court was a question of whether or not the treaty was intended to prohibit the imposition of a financial burden by the Government upon the right of the Indians to catch and sell this fish. The court construed the treaty as prohibiting such action. If a gross income tax, to be set aside for the benefit of the Indians, was a violation of the treaty, then certainly a net income tax to be used for general Governmental purposes is even more plainly such a violation. It is significant that the Indian Department did not even seek a review of this case by this court, although a perpetual injunction was issued in the case. This is probably the reason why, since that time, the department has permitted the Indians to sell this fish to any person and to use the proceeds as they see fit.

As we have indicated, the Quinaielt treaty has been before the United States Court on two occasions. The first case was the case of *United States v. Payne*, 264 U. S. 446; 68 Law Ed. 782. This was a suit brought by a member of the Quilleute tribe

to determine his right to an allotment of an eighty-acre tract of timber land in the Quinaielt Indian Reservation. The Government contended that, since the general allotment act provided that there should be allotted to the members of the tribe such lands as "may be advantageously utilized for agricultural or grazing purposes," the plaintiff was not entitled to an allotment of timber lands. The court rejected this contention, holding that a liberal construction of the treaty required a different conclusion. Among other things, the court observed: "It follows that if the allotment act is now construed to exclude such lands from allotment, a materially restrictive change would have been wrought in the terms of the treaty. Such a construction is to be avoided if possible."

It is not contended that the facts in that case have anything to do with the exercise of the power of taxation, but the decision does construe the treaty for the benefit of the Indians, in the face of seemingly specific language in a general statute governing the same subject matter. The logic of the case would certainly seem to support the proposition that the broad language of the Internal Revenue Act should not be construed in such a way as to substantially burden the ancient fishing rights which the Indians reserved in 1855.

This treaty was again considered by the Su-

preme Court of the United States in the case of *Halbert v. United States*, 283 U. S. 751; 75 Law. ed. 1389. That case involved the following situation: Article II of the treaty provided that the Indians reserved for their use and occupation a tract to be designated by executive order, which should be "sufficient for their wants." As was noted in the opinion, on November 4, 1873, the President by executive order established the Quinaielt Indian Reservation, which contained about 200,000 acres and which included a prior provisional reservation of 10,000 acres. Later, by the Act of March 4, 1911, Congress directed the Secretary of the Interior to make allotments on the Reservation "under the provisions of the allotment laws" to all Indians who were affiliated with the Quinaielt tribe. The plaintiffs in the case were of Indian blood and descent, but none of them were members of the Quinaielt tribe and many of them did not reside on the Reservation. Notwithstanding the fact that the general allotment laws of the United States did not make the plaintiffs eligible for an allotment, it was held that personal resident on the Reservation was not necessary to secure an allotment, and that persons of mixed blood had the right to participate. Judgment was, therefore, entered for the plaintiffs.

It is not contended that there is any similarity between the facts in the case and the present action.

The decision, however, does again enunciate the rule that Indian treaties will be most liberally construed to the benefit of the Indians, and *that general statutes will not be construed as intending to modify or limit rights previously granted by an Indian treaty.*

We have attempted to establish the proposition by the foregoing argument that this treaty was intended to prevent the imposition of any tax upon either the taking of fish from the waters of this river or upon the sale of fish so taken. It may be suggested that Congress has the power, by statute, to repeal or modify an Indian treaty and that, therefore, the Internal Revenue Act under which this tax was imposed should be so construed. There are two answers to this suggestion, if it is made. The first answer is as we have stated before, that the court will not construe a general statute as intended to impliedly modify or limit the provisions of a treaty. The cases of *Halbert v. United States,* supra, and *United States v. Payne,* supra, definitely establish this principle. In addition to these cases, we direct the court's attention to *United States v. Powers,* 305 U. S. 527; 83 Law Ed. 331. In that case it was held that the right to persons acquiring through Indian Allottees lands formerly a part of the Crow Indian Reservation and set apart by treaty, to divert water from streams within the

Reservation, was superior to the general right of the Government to divert water for irrigation projects. The Government contended that because the Secretary of the Interior was authorized by general statute to initiate irrigation projects on Indian reservations, that the right of the Indians was modified. This was answered by the court in the following language:

> "We find nothing in the statutes after 1868 adequate to show congressional intent to permit the allottees to be denied participation in the use of waters essential to farming and home making. *If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purpose.*"

As we shall hereafter show, the reason why an executive practice by the Bureau of Internal Revenue, of over twenty years duration, which was based upon at least four opinions of the Office of Attorney General of the United States, was reversed, was on account of what was thought to be the law announced in the case of *Five Civilized Tribes v. Commissioner*, 295 U. S. 418, 79 Law Ed. 1517, generally known as the "Sandy Fox Case." We shall have occasion to discuss that case more extensively hereafter. Insofar as the present point is concerned, it may be said that the court there held a certain type of income which accrued to a restricted Indian, subject to an income tax,

there being no treaty provisions which gave immunity from taxation. At the same time, however, the court said:

> "The general terms of the taxing act include the income under consideration and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs."

In other words, the opinion indicates quite clearly that had the particular income there involved been protected from taxation by treaty, then a different conclusion would have been reached. Similarly in *Choteau v. Burnet*, 283 U. S. 691; 75 Law Ed. 1353, the court, in holding that certain income accrued to a competent Indian from royalties upon oil and gas leases of tribal lands, was taxable, observed:

> "No provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay taxes upon income derived by him from his own property."

By necessary implication, then, the court held that had there been such an exemption, then a different conclusion would have been reached.

Even if it be concluded that Congress intended by the passage of the Internal Revenue Act to modify this clause of the treaty, as construed in

Tulee v. Washington, supra, it may, nevertheless, be doubted whether such power existed under the doctrine announced by the Supreme Court of the United States in *Choate v. Trapp*, 227 U. S. 665; 56 Law Ed. 941. That case involved an agreement entered into with representatives of the Government and the tribes for the extinguishment of Indian title to certain lands in the Oklahoma country and for the allotment of lands to the members of the tribe, and provided specifically that the lands so alloted "shall be non-taxable while the title remains in the original allottees." On May 27, 1908, Congress passed a general statute removing all restrictions from the sale of these lands by the Indians and provided further that the lands from which the restrictions had been removed should be subject to local taxation. Thereupon, and under this Act, Oklahoma sought to tax the lands. The court held the law to be void under the Fifth Amendment to the Constitution of the United States, stating that the exemption "was a vested property right which could not be abrogated by statute."

It may be admitted that this case is apparently in conflict with the case of *The Cherokee Tobacco*, 11 Wall. 616, 20 Law Ed. 227. In any event, the Choate case was decided by a unanimous court almost forty years after the Cherokee case and must

be deemed to be controlling. The court will find an excellent discussion of this case in "Handbook of Federal Indian Law" by Felix S. Cohen, which was printed by the public printer in 1941. The question is discussed at page 265 of this book. It might be observed that the volume bears upon the title page the words, "United States Department of the Interior, Office of the Solicitor." and that Mr. Cohen was chairman of the Board of Appeals of the Department of the Interior, and that written introductions by Secretary of the Interior Harold L. Ickes and Solicitor Nathan R. Margold are therein contained.

We have not found any decision of the United States Supreme Court in which the authority of the Choate case has been denied. We submit, therefore, that irrespective of questions of statutory interpretation of the Revenue Act, petitioners, under the treaty, acquired a vested right to these fish and that this vested right could not be impaired by the Congress under the provisions of the Fifth Amendment.

The Imposition of This Tax Is Not Authorized By the Revenue Act Even Though There Is No Express Exemption In The Treaty

In the preceding portion of this brief we have sought to establish the proposition that the treaty

should be construed as exempting this type of income from an income tax and that, therefore, (1) it should not be deemed modified by implication by the Revenue Act, and (2) that in any event, under *Choate v. Trapp*, supra, a vested right was created which could not be impaired by subsequent legislation. Even, however, if the court concludes that there is not contained in the treaty any exemption from taxation and distinguishes *Tulee v. Washington*, supra, in some manner, it is nevertheless submited that under proper rules of construction and long-settled executive practice, the court should not construe the provisions of the Revenue Act as intending to apply to this type of income. The basis of this position arises out of the facts and circumstances which we have related, and the peculiar relationship between the Indians and the Government. We intend to examine this question in the light of previous executive practice and judicial decision, and then inquire whether that practice and those decisions must necessarily be overruled by the Sandy Fox case.

We refer, therefore, first to executive practice. The evidence in the case shows that no attempt has ever been made to collect this tax by the Bureau of Internal Revenue during the entire period from the passage of the first Revenue Act to 1943, except in 1923 when an attempt was made to col-

lect the tax, which was immediately thereafter followed by a reversal of position by the Government. We do not have available complete Governmental records showing the full course of Government construction. However, the entire picture seems to be fairly accurately set forth in a number of decisions of the attorney general of the United States, which officer is the ultimate legal adviser of both the Bureau of Internal Revenue and the Department of the Interior. This matter was considered in detail by Attorney General Harry M. Dougherty in an opinion given to the Secretary of the Treasury on March 15, 1924 (34 Op. Att. Gen. 275). In that case it was held that income received by individual members of the Five Civilized Tribes from tax-exempt lands allotted in severalty, was not subject to taxes imposed by the Revenue Acts of 1916 to 1921, inclusive. This opinion, as we read it, was based not only upon the proposition that exemption from taxation had been theretofore created by express agreement, but upon the general idea that the nature of the relationship between the Government and non-competent Indians precluded a construction of the Revenue Act which called for the collection of the tax.

It may be admitted that the opinion is, to a certain extent, obscure upon this last point, but it seems to have been so understood by Mr. Dough-

erty's successor in office, Harlan F. Stone, later a member of the Supreme Court of the United States. On August 14, 1924, Attorney General Stone wrote an opinion to the Secretary of the Interior (34 Op. Att. Gen. 302), in which it was held that claims for the return of funds which the Indian Superintendent had disbursed in payment of income received from tax-exempt lands should be refunded, irrespective of the general statute of limitations. The opinion of Attorney General Stone refers specifically to the previous opinion of Attorney General Dougherty and states: "The Attorney General there considered at length the relationship between the Indian and the Federal Government and discussed the paternalistic attitude of the Federal Government toward its dependent wards and its control over their property and income."

Whatever may have been the real basis of the original opinion of Attorney General Daugherty, it was squarely held in an opinion of Attorney General John G. Sargent, dated March 20, 1925, directed to the Department of Justice (34 Op. Att. Gen. 439) that the Internal Revenue Act did not apply to income from allotted lands. In that opinion it was held that rents, royalties, or other income of the Quapaw Indians derived under leases, or otherwise, from their alloted lands during the restricted period, were not subject to Federal

income tax law. The opinion first dicusses the circumstances of the treaty with the Quapaws. Unlike the treaty with the Five Civilized Tribes, this treaty contained no exemption from taxation. After reviewing the treaty, Attorney General Sargent said:

> "It is obvious from the poverty-stricken condition of these Indians and the circumstances surrounding their removal to the land now in question that taxation of said land at that time was not contemplated. Taxation then would have meant destruction. Moreover, the lands relinquished by the Indians had not been subject to taxation or interference in any way by the Federal Government."

So in the case at bar. It is obvious from the condition of these Indians, as revealed by the correspondence between Col. Simmons and Governor Stevens, that taxation of this fish was certainly not contemplated. It is also true that here, as there, the Indians had not theretofore been subjected to taxation by the Government. After reviewing numerous decisions, Attorney General Sargent concluded:

> "True, the Federal Income Tax Statutes are in broad compass and impose a tax upon the entire net income of 'every individual.' Section 1(a), Revenue Act of 1916, 39 Stat. 756; Section 210, Revenue Act of 1918, 40 Stat. 1057; Section 210, Revenue Act of 1921. 42

Stat. 227; Section 210, Revenue Act of 1924, 43 Stat. 253. No specific reference, however, is made in these Acts to Indians and their property. We have seen that none of the treaties or statutes dealing with the Quapaw Indians contains and provision subjecting their lands to State of Federal taxation. On the contrary, by the Quapaw Allotment Act Congress, instead of providing a way to compel the Indians to contribute out of their property to the support of the Federal Government, immediately concerned itself with a provision of law securing to them the continued possession and enjoyment of their lands by making the same inalienable. In order to make this restriction against alienation properly effective, it would seem that inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property, the management and control of which, rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.

"Therefore, in the absence of clear congressional authority to that effect, I am of opinion that the income from the restricted lands of the Quapaw Indians is not subject to the Federal income tax law.

> "The opinion of the Attorney General of March 15, 1924, relative to the taxability of the Five Civilized Tribes, is largely applicable to the question here presented."

This opinion was adhered to in the opinion of Attorney General John G. Sargent dated November 11, 1925, to the Department of Justice (35 Op. Att. Gen. 1). That opinion involved a treaty with the Kaw Indians which had an express exemption from taxation, but Attorney General Sargent holds specifically that the tax should not be collected, irrespective of this treaty, and then adds a second and, as he states, "an additional reason" to the effect that the agreement exempted the lands from tax. In the opinion he also said:

> "It is to be presumed that Congress has not intended to violate that compact and there is nothing in the general provisions of the Federal income tax statutes to overcome this presumption."

These opinions were referred to and re-affirmed by Attorney General Sargent in an opinion dated June 24, 1926, addressed to the Department of Justice, (35 Op. Att. Gen. 107), involving the question of whether an Indian living on non-allotted lands on a reservation was required to pay an income tax upon income derived from the purchase of cattle, and other business, on the reservation. The power to tax was denied for the stated reason that:

> "To tax them is so inconsistent with the purposes and object of the Government in its dealing with these Indians, and the relation that it maintains toward them and their property, that it can not be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress."

From these references it plainly appears that the executive construction of the Revenue Acts by the executive department was uniform and that this construction denied the power to tax, and that seems to have been the universal practice of the Government until the Supreme Court of the United States decided the Sandy Fox case, supra, because on September 27, 1937, Attorney General Homer Cummings addressed a nine-line opinion to the Secretary of the Interior (39 Op. Att. Gen. 107), which opinion reads as follows:

> "The decision of the Supreme Court in *Superintended v. Commissioner*, 295 U. S. 418 (May 20, 1935,) that income on funds derived from the restricted allotment of a full blood Creek Indian which are in excess of his needs and are held by the United States in trust for him, is subject to the Federal income tax, must prevail over the contrary conclusion reached in the Attorney General's opinion of March 20, 1925 (34 Op. 439), regarding the taxability of income from restricted lands of the Quapaw Indians."

This opinion was apparently the basis of the change in attitude of the executive department of the Government, although the reasons why the Government waited from 1937 to 1943 before it attempted to collect income taxes from the members of this particular tribe, are obscure.

It is significant that during this period of time a number of income tax statutes were passed. There is no doubt but that Congress was informed of these rulings of the Office of the Attorney General. Yet we have not found that any amendment to any of the income tax laws was ever suggested which would specifically make this form of income subject to taxation. During this period, the decisions of the lower Federal courts, although not numerous, denied the power to tax. It is unnecessary to review these cases in detail, since the reasons given were in substance the reasons set forth in the opinions of the Attorney General to which we have referred.

Choteau v. Commissioner, 38 Fed. (2d) 796, commonly known as the "Blackbird Case," is a good illustration of this class of cases. That case involved an attempt made by the Commissioner of Internal Revenue to impose income taxes, (1) upon a member of the Osage tribe of Indians, who had not received a certificate of competency, upon income accruing from allotted lands, and (2) upon income

accruing to a white woman who had inherited from her children who were members of the tribe, and (3) income accruing to one Choteau, a member of the tribe who had received a certificate of competency. The Board of Tax Appeals affirmed the levy of a deficiency tax upon all of these Indians. The ruling was affirmed as to the white woman and the competent Indian, but reversed as to the restricted member of the tribe. The basis of this conclusion was the opinions of the attorney general which was have referred to. The subsequent course of this litigation is rather interesting. Choteau, an unrestricted Indian, who was the unsuccessful litigant before the Board of Tax Appeals and before the Circuit Court, procured a writ of certiorari to the Supreme Court of the United States from this decision. It is significant that the Government did not seek to have that portion of the decision which announced immunity from taxation upon the part of the restricted Indian reviewed. The decision sustained the power to tax, in general language. The decision is not authority upon which to predicate the assertion that the right to tax restricted Indians upon this type of income exists.

Other cases which more or less sustain this view are as follows: *Richards v. United States*, 21 Fed. (2d) 94; *Lewellyn v. Cononial Trust Co.*, 17 Fed. (2d) 36; *Bagbzy v. United States*, 60 Fed. (2d) 80; *Pitman v. Commissioner*, 64 Fed. (2d) 740.

From this resume it will be observed that both executive and judicial construction support the idea of immunity. Apparently, the subsequent action of the various Governmental departments was based upon a misapprehension of the scope of Attorney General Cummings' review of the decision in the Sandy Fox case. The opinion contradicts itself. It first states that under the decision in the Sandy Fox case, income on invested funds which originate from an allotment and which are in excess of the needs of the Indian, is subject to the Federal income tax. To that extent, the opinion makes a correct statement of the law, as laid down in the Sandy Fox case.

It is then stated, however, that this "must prevail over the contrary conclusion reached in the attorney general's opinion of March 20, 1925, regarding the taxability from restricted lands of the Quapaw Indians." The opinion of the attorney general there referred to involved an attempt to tax the income derived from alloted lands. It did not involve the question of the right to tax incomes derived from the investment of surplus income, which was the only question decided in the Sandy Fox case. It would seem, in view of the careful and elaborate discussion by the predecessors in office of Attorney General Cummings, including Justice Stone, that the question should have been more

carefully examined, because the Sandy Fox case did not decide the question here involved, nor has the question ever been decided by the Supreme Court of the United States. The Sandy Fox case, insofar as the Federal courts are concerned, originated in a petition to review a decision of the Board of Tax Appeals which held that income derived from the investment of surplus income contained in an Indian's allotment was taxable under the Revenue Act. The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (75 Fed. (2) 183). The opinion was by a divided court, the majority opinion being written by Circuit Judge McDermott.

It is unnecessary to quote this whole decision, but it may be pointed out that the majority opinion very carefully distinguished between income derived directly from an allotment and income derived from the investment of surplus income. This is made apparent from the portion of the decision in which the court reviews certain decisions of the Board of Tax Appeals. The court called attention to the fact that in *Snell v. Commissioner*, 10 D. T. A. 1081, the Board of Tax Appeals had held that income from the investment of income was subject to an income tax, but that in 1929 in the case of *Blackbird v. Commissioner*, 38 Fed. (2d) 976, the court reversed the Board of Tax Appeals in its attempt

to include within the scope of the Snell decision income from an original allotment. The opinion also calls attention to the fact that after the decision in the Blackbird case, regulation G.M.C. 9621 was adopted by the Commissioner "under which restricted Indians are exempted from tax from such incomes as are dealt with in the Blackbird case, *but taxed upon incomes from investments of incomes.*"

The court then called attention to the fact that subsequently Congress had twice re-enacted the income tax law and had not disturbed this departmental ruling, and also called attention to the fact that Congress by a joint resolution had recognized the soundness of this ruling. The opinion then concluded:

> "Congress is therefore familiar with the distinction between income from the original heritage of the Indian and other income. There is, moreover, a reason for the distinction. The income from the allotments of many or most of the Indians is barely sufficient to support them; but oil was discovered upon the allotments of some, and those received an income much larger than their needs; when that surplus was invested and in turn produced income, there is reason in requiring such wealthy Indians to contribute to the cost of the government whose services they enjoy. In the fact of this history, we conclude that Congress is content with the administrative interpretation of its acts."

This language is equally applicable to the members of the Quinaielt tribe. Certainly under this record, the meager income which the members of this tribe receive from the taking of this fish, which is the tribal property of the tribe, is hardly adequate for subsistence, and therefore, under the decision is exempt from tax.

We have gone into the history of this case, both before the Board of Tax Appeals and before the Circuit Court of Appeals of the Tenth Circuit, with some particularity so that the rather dogmatic language of Mr. Justice McReynolds in *Five Civilized Tribes v. Commissioner*, 295 U. S. 418; 79 Law Ed. 1517, can be more understood. As we have noted, the Circuit Court, by an elaborate opinion, very definitely restricted the scope of its decision to income arising from the investment of surplus funds, and in express language held that this conclusion did not apply to "income from the original heritage of the Indian." The decision of the United States Supreme Court occupies about a page and a half, of which three-fourths is composed of quotations. It may be admitted that there is language in the decision, if taken literally, which supports the power to tax any income of restricted Indians where there has been no treaty or agreement creating a tax exemption.

If the case is read in its entirety, however, it

seems to us that, although it was somewhat carelessly written, in view of the very serious importance of the question, that it did reserve this question. The opinion starts with the statement that Sandy Fox was a full-blood Creek Indian and that "Certain funds, *said* to have been derived from his restricted allotment in excess of his needs were invested. The proceds therefrom were collected and held in trust under direction of the Secretary of the Interior. The question now presented is whether this income was subject to the Federal tax laid by the 1928 Revenue Act." It is difficult to understand the statement of the court, that these funds were said to have been derived from excess moneys which had been invested. As we understand it, this fact was agreed to by both parties in the court below and in the Supereme Court. It was not contradicted that this invested money was money which the Government, as trustee, had invested, after allotting to the Indian an amount deemed adequate for the support of the Indian. According to the opinion of the Circuit Court, the income derived from such invested savings amounted to $16,149.18 in the year in question. Certainly, then, there was no doubt concerning the facts. It is also significant, as appears from the opinion of the Circuit Court of Appeals, that when the superintendent of the agency made his return to the Government for the Indians, that the only return which he made was

the income derived from such invested savings. Insofar as we are informed, he made no return covering the income from the allotment which was not available for investment. Neither the Commissioner nor the Board of Tax Appeals seems to have questioned the propriety of this action.

The opinion then sets forth a quotation from the Blackbird case having to do with the taxability of income received by a restricted Indian from allotted property, in which the power to tax had been denied, and from which decision the Government had not appealed. Mr. Justice McReynolds then states that that quotation did not harmonize with what had been said by the Supreme Court in *Choteau v. Burnet*, 283 U. S. 691, 75 Law Ed. 1353. This statement, as we have shown, was inaccurate, to say the least. The Choteau case was an appeal by a non-restricted Indian in the Blackbird case. The court in the Choteau case very carefully avoided passing upon the question in Blackbird's case which had been decided by the Circuit Court of Appeals and from which decision the Government did not appeal. Mr. Justice McReynolds then observed that: "The Court below properly declined to follow its quoted pronouncement in Blackbird's case." It is difficult for us to appreciate the basis of this statement. As we have shown, the court below referred with express approval to its previous decision in

the Blackbird case and distinguished it, and held that there was a substantial difference between income accruing from the investment of surplus funds and income arising from an allotment and used by the Indian for subsistence purposes.

From this it will be seen that Mr. Justice McReynolds was not called upon to decide the question of whether the ruling with respect to Blackbird was correct or was not correct. As we have shown, that question was not before the court. While the first portion of the opinion is very broad and perhaps inconsistent with our position, if the court will read the next to the last paragraph, it will be seen that the ultimate question was finally saved in the decision. It was there said:

> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship *that exemption is a necessary implication.*"

The court did not say that taxation of income arising directly from an allotment was not necessarily inconsistent. The implication from the decision is that there might be instances in which it would be held that such taxation was so inconsistent with the relationship that exemption is a necessary incident. We submit, therefore, that this case is not controlling and that the present position of the Indian Department and the Commissioner, based

solely upon the Sandy Fox case, is not justified by that decision.

If we consider this case from the standpoint of principle, it seems clear to us that in the light of the history of this treaty and the peculiar geographical position of the Quinaielt tribe, that this taxation is inconsistent with this relationship. As we have shown, these Indians have but two sources of income, outside of the bounty of the Government, and these are the sale of the timber and the catching of the fish. Timber can only be marketed in accordance with general developments in the logging industry, i. e., a tract of timber cannot be sold to advantage until logging developments in the area make it profitable for a prospective purchaser to buy and log the timber. The necessary result of this is that many of these allottees have received nothing from their timber and will not until that timber is logged, which may be many years hence. They do, however, rely upon the fish of this river to a substantial extent to aid them in procuring the bare necessities of life. The situation here is in no way analogous with the situation in the Oklahoma country where huge oil fields were discovered and developed on the lands of the Indian allottees, and by reason thereof, huge sum accrued, far in excess of the primary needs of the Indians.

It is a familiar axiom of the law that bad cases sometimes make bad law. It is quite easy to understand why the Supreme Court, in the Sandy Fox case, when confronted with the claim of an Indian that some $16,000.00 in one year of surplus income was exempt, should have denied the exemption. An argument based upon this theory of relationship, as was adequately pointed out in the opinion of the Circuit Court in the Sandy Fox case, depends upon the practical necessities of the situation, and as was stated, there was a reason to require wealthy Indians to contribute to the support of the Government, even though the income, from a technical standpoint, could be traced back to their ancestral allotment, which would not apply, however, to subsistence income. Here, however, there is no such situation. There are probably not as many fish in this river today as there were in 1855, whereas, upon the other hand, the material wants of the members of the tribe have increased. For a guardian to take from a ward such a type of income is certainly inconsistent with the relationship, and should not be done, save pursuant to express Congressional mandate. We submit that this is an original question insofar as the Supreme Court of the United States is concerned and that it should now be decided upon the merits.

This Money Represented The Sale of a Capital Asset And Was Not Income

It may be admitted that the formula which was adopted by the Commissioner with respect to this income was the ordinary formula which is followed in taxing the proceeds of an ordinary commercial fisherman, i. e., there was first ascertained the gross revenue received, then there was deducted from that item all necessary expenses involved in the taking of the fish, and the difference was declared to be net income. This case, however, involves unique circumstances which, we submit, distinguishes it from the ordinary case. The courts have uniformly held that, insofar as our white populations are concerned, title to wild game and fish is reserved to the sovereign until such time as a citizen reduces the fish or game to passession, *Geer v. Conencticut*, 161 U. S. 519, 40 Law Ed. 793.

As is pointed out by Judge Cushman in *Mason v. Sams*, supra, this is not the rule with respect to this fish, because as he said, "The fish in the waters of this stream do not belong to the State nor to the United States; but to the Indians of the Reservation". The Indians as a tribe reserved title to the fish. If ever a property constituted, and still does constitute, a capital asset, this fish certainly is an

asset of that description. In earlier days it was something without which the Indians would have perished. Even in this modern age it is still a substantial factor in the welfare of this tribe. It should be remembered that there is not involved here the sale of processed fish in commercial channels. The stipulated facts show that these fish were taken from the waters of this river in their natural state and were immediately sold to fish buyers who then processed them into cans and thereafter sold them to the trade.

The Indians had two capital assets, timber and fish. In another case which may soon be presented to this court, the Government has sought to tax capital gains alleged to have accrued to the members of this tribe from the sale of allotted timber. We submit that there can be no difference, in view of the peculiar circumstances of this case, between the sale of timber and the sale of fish. If the sale is treated as the sale of a capital asset, then there can be no tax because there is no proof to sustain the application of any theory of a capital gain, nor does the Commissioner seek to impose the tax upon that theory.

The Government Is Precluded In Any Event From Seeking To Impose Taxes For Any Years Prior To 1943

This point would only be material should the

court overrule the contentions which we have here-to-fore made. We have previously shown in this brief that for a period of many years these Indians were advised by their Indian Agent, who was, in effect, their guardian, that it was not necessary to file returns or to pay taxes on this type of income. It further appears that these instructions were given to the Indians pursuant to the instructions of the attorney general of the United States, a member of the President's cabinet and the legal advisor of all branches of the Government. It further appears that the moneys which accrue from the sale of this fish is most variable and uncertain and that only at considerable intervals is there sufficient fish in the river to justify commercial fishing (Tr. page 52-55).

We have shown by the decisions that the relationship between the Government and the Indians is unique and peculiar, perhaps even greater than that between guardian and ward. We appreciate quite well the general rule of law that the unauthorized act of a public official cannot be used as an estoppel to prevent the governmental agency involved from enforcing a proper law. This case, however, is not of that character. The Government, through its authorized agent and under authority of its highest law officer, advised these Indians that this income was not subject to tax, and while the

record does not show this, we think that it is safe to assert that few, if any, of these Indians by 1943 had any of the proceeds of the 1941 fishing season available for the payment of any retroactive tax. The record shows that 1942, 1943, and the present year were substantial fishing failures.

This view seems to find support in the opinion of Attorney General Stone, given to the Department of Justice on August 14, 1924, and to which we have before referred in another connection. (34 *Op. Att. Gen.* 302). As we have noted, the attorney general's office had held that certain moneys accruing to the Indians were not subject to Federal income taxes. The superintendent of these tribes had made returns for them and had paid from trust funds, income taxes to the Internal Revenue Bureau. The statute of limitations provided that claims for refunds must be filed within five years. When it was discovered that the income was not taxable, claims were filed but in many instances, five years from the time the taxes were paid or assessed. The question determined by Attorney General Stone was whether the statute of limitations applied. It was determined that it did not. It was said:

> "It goes without saying that the superintendent of the said tribes is an instrument of the Government officially functioning to execute the Government's policy toward the Indians under the superintendent's supervision."

It was further stated that if the superintendent failed to discover the irregularity of his action within the five-year period,

> "The Indian is not to blame for this, and, if the Government could take advantage of the mistake of its own agent in this respect, it could go just one step farther and in the interest of its revenue instruct the superintendent to allow such claims to lapse. It is needless to rule that such a practice would be repugnant to our conception of a just and fair Government's policy toward this dependent people."

We do not assert that if the law is as claimed, the rulings given by the attorney general of the United States and reiterated to the Indians by the Indian Agent, would preclude a present reversal of that ruling and the future collection of taxes by the Government from the Indians. Such a contention would involve the attempted invoking of an estoppel based upon the unauthorized act of a public officer. This, however, is quite a different situation. Here, the Indians made no return and made no provision for the payment of taxes upon this income, because they were advised by the very government which now demands the tax, that they did not have to pay the tax. If the Government can impose taxes for 1941, it can impose taxes for 1915 or 1916, because, as we understand it, the statute of limitations does not begin to run until a return is filed. We have no appropriate authority for this

point other than the opinion of Attorney General Stone. The circumstances are unusual and they justify the application of a just and equitable rule of law. If the Government wins and collection is rigorously insisted upon, then bankruptcy will ensue for many members of this tribe; and if there is bankruptcy and the meager assets of the Indians are taken to pay the tax, then immediately the Government, as the guardian of these Indians, will render assistance for the necessities of the Indians probably many times in excess of any possible tax which could be collected. We appreciate the fact that ordinarily reasons of necessity are not good reasons in law. We do not refer to this with that motive. They are referred to so that there may be appreciated the absurdity of a contrary construction. The courts have not hesitated to protect the rights of Indians, without much regard to technical rules of law. This, we submit, is such a situation. There can be no doubt but that if the total proceeds realized by these Indians from the sale of the fish over a period of years were averaged over the years, then there never would be any taxable income under any theory and this case would not be here.

We submit that the Government should be bound by the deliberate action of its highest officers and that certainly the repudication of these actions,

based upon some broad language of Mr. Justice McReynolds, the construction of which is certainly subject to argument and which in any event was dictum, should not permit this act of injustice to be sustained, whatever may be the future action of the Commissioner.

Respectfully submitted,

L. L. THOMPSON

L. B. DONLEY

Attorneys for Petitioners

Address: 1410-24 Puget Sound Bank Building,
Tacoma, Washington

Appendix

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following facts are true and may be considered by the court as evidence in this proceeding:

1. Petitioners, Charles Strom and Flora Strom, during the taxable year 1941, were and for many years last past have been husband and wife residing together as such in the town or Indian village of Taholah, Grays Harbor County, State of Washington, which town is situated wholly within boundaries of the Quinaielt Indian Reservation. The Quinaielt Indian Reservation is an Indian Reservation located, lying and being wholly within Grays Harbor and Jefferson Counties, Washington. The boundaries thereof are correctly shown in the attached map of the Olympic Peninsula of the State of Washington which said map is marked as Joint Exhibit 1-A and made a part hereof. No Federal tax returns have been filed by petitioners for the taxable year 1941.

2. The petitioner Charles Strom is an Indian of full blood of the age of fifty-four (54) years, and was born at LaPush, Washington. He is a

member of the Quinaielt Indian tribe and has resided on the Quinaielt Indian Reservation at Taholah, Washington for a total of about forty-four (44) years. Petitioner Flora Strom is ¼ degree Quinaielt Indian.

3. The Quinaielt Indian Reservation has as its westerly boundary the Pacific Ocean. The Quinault River flows from Lake Quinault on the Easterly end of said reservation in a Westerly direction, emptying into into the Pacific Ocean at the said village or town of Taholah, Washington. During the spring and fall seasons there are runs of fish up the said river and to the said lake. From time immemorial the Quinaielt Indians and allied tribes have taken fish from the said Quinault River for their own use and, in later years, for sale.

4. For many years prior to 1911 pursuant to the Tribal customs and practices of the Quinaielt Indian tribe certain Indians were allotted by the Tribal leaders, the exclusive right of taking fish from certain areas on the Quinaielt River and in the lower or Western Fifteen (15) miles thereof. About the year 1911, or subsequently, the Department of Interior of the United States of America, acting by and through the United States Indian Service, began allocating to certain Indians, in accordance with said Tribal custom and usage, certain exclusive locations for the taking of fish from the

said river. On April 9, 1919, E. B. Merritt, Assistant Commissioner of the Office of Indian Affairs of the United States of America promulgated certain regulations for governing fishing on the Quinault river. A full, true and correct copy of said regulations is hereto attached and marked as Joint Exhibit 2-B and made a part hereof.

5. Since the date of the decision of the United States District Court for the Western District of Washington, Southern Division, rendered in the year 1925 in the case of *Mason v. Sams*, reported at 5 Fed. (2d) 255, the Indians on the Quinaielt Reservation have established their own regulations governing fishing operations in the various streams and lakes thereon, which practices have since been conducted without any Federal, State or administrative interference or supervision outside the tribe. Thereafter the sole control and government of fishing rights and practices on the Reservation has been under the direction of the Quinaielt Indian tribe acting by and through its Tribal Council.

6. The Quinaielt Indian Tribal Council thereafter adopted the aforesaid regulations, Joint Exhibit No. 2-B, in their entirety save and except from time to time the same have been amended in matters relative to the fishing sasons and the gear to be used. In all other material respects said regulations have been and are enforced by the Quin-

aielt Indian tribe acting by and through its Tribal Council with the aid of what is known as the Channel Police of said tribe.

7. Pursuant to said rules, regulations, Tribal customs, usages, orders and regulations adopted by the said Tribal Council, certain, but not all of the charted fishing locations on the Quinault River have been, during the year 1941, and now are allotted and assigned for the use of certain individual members of the said tribe. There is attached hereto marked at Joint Exhibit 3-C and made a part hereof a blueprint made in 1932 showing the locations of seventy-eight (78) of such fishing locations, as they existed in 1916. For many years last past, and during the year 1941, Charles Strom and his wife have been recognized as having the exclusive right to use and to take fish during proper seasons and with proper gear from location No. 7 as shown on the said blueprint. Said fishing location No. 7 at all times since the creation of said reservation has remained as common Tribal property not allocated, and is subject only to the rights of use granted by the Tribal Council to the said Charles Strom and wife.

8. Said fishing locations are on both sides of the Quinault River and each is 255 feet in length. There are similar fishing locations within said reservation on the Queets River (see Joint Exhibit No.

1-A) which said fishing locations are also governed by the similar Tribal regulations. The size of locations, gear usable, and fishing seasons on the Queets River, however, differ from those pertaining to the Quinault River.

9. The matter of allocation of these several fishing locations were, in the beginning, based upon Tribal members taking over certain grounds which were recognized as being exclusive locations of such Tribal members. Under Tribal rules, regulations, and customs, and the orders of the Tribal Council, such fishing locations may be assigned to other persons or may pass, upon death of a holder of such a location, to his family, with the limitation, however, that such fishing locations may only be assigned or passed to members of the tribe who maintain a home upon the reservation. Such fishing location must be fished at least once each year in a businesslike manner, failing which such locations are deemed by Tribal custom to have been abandoned.

10. Under Tribal rules, regulations and customs, fish taken from such locations may be sold only to persons licensed as Indian traders. Licenses to Indian traders are issued by the Indian Agency subject to the approval of the Tribal Council of said tribe. After purchasing fish the Indian traders are at liberty to dispose of them in any manner

they deem advisable, either on or off the reservation and at such market as they may desire.

11. During the year 1941 the Mohawk Packing Company of Moclips, Washington, was issued an Indian fish buyers license and during that year bought fish taken from such locations through their agent, Cleveland Jackson, who then was and now is a member of the Quinaielt tribe residing on said reservation. The Mohawk Packing Company has a plant located at Moclips, Washington which is located near to but is not located upon said reservation. The Mohawk Packing Company is an independent organization and is managed and controlled by one Victor Borden who is not an Indian or a member of any Indian tribe.

12. During the year 1941, by oral agreement with Cleveland Jackson acting for and in behalf of said Mohawk Packing Company, the petitioners, Charles Strom and wife, sold and disposed of fish caught by them in their fishing location No. 7 to the said Mohawk Packing Company. Said oral agreement was not exclusive, however, and petitioners were under no legal obligation to sell their fish to the said Mohawk Packing Company. They did actually sell their fish, during the 1941 fishing season, to the Mohawk Packing Company which fish were bought by the said Cleveland Jackson at the going market price.

13. During the taxable year 1941 petitioners realized income from fishing operations from fishing location No. 7 on the Quinault River which they were permitted to use as follows:

Gross income from sales of fish to the Mohawk Packing Company		$5,917.29
Less: Wages paid others for assistance in connection with the spring run of salmon	$1,754.52	
Wages to others for assistance in handling the fall run of salmon	326.87	
Miscellaneous expenses	369.20	
Truck expenses	150.00	2,600.59
Net income realized during the taxable year		$3,316.70

In his deficiency notice respondent determined that petitioners are subject to tax on the net income derived by them from fishing operations as shown above and computed an income tax thereon in the amount of $169.67, the details of which are fully set out in the notice of deficiency, a copy of which is attached to the petition. In addition to said deficiency also asserted a 25 percent penalty thereon in the amount of $42.42 for failure to file a return as required by law. On the basis of the facts developed and established since the deficiency notice was issued respondent now specifically waives the amount of penalty previously asserted and

makes claim only to the deficiency in tax determined in the notice of deficiency.

14. The treaty by and between the United States of America and the Quinaielt and other allied Indian tribes was entered into on July 1, 1855. A full, true and correct copy of said Treaty is hereto attached marked Joint Exhibit No. 4-D and made a part hereof. No further or different treaty by and between the United States of American and said Indian tribes has ever been entered into or consumated.

15. On November 4, 1873, the President of the United States, by executive order, created the Quinaielt reserve or Indian Reservation. A full, true and correct copy of such executive order, is hereto attached and marked Joint Exhibit No. 5-E and made a part hereof. At all times since said reservation, as shown on Joint Exhibit No. 1-A, has been and now is the reservation of the Indians covered by said treaty and by such executive order.

16. Prior to the year 1941 substantially all of said reservation lands and the timber growing thereon, were allotted to various members of said tribes. There is attached hereto marked Joint Exhibit 6-F and made a part hereof a copy of the official map of the said Indian Reservation lands showing the allotment numbers thereon.

17. Neither Charles Strom nor Flora Strom have ever received certificates of competency and at all times herein mentioned were and now are considered by the Office of Indian Affairs of the United States of America as incompetent wards of the Federal Government. By act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I p. 253 v. 233) they were and are citizens of the United States of America. The said Charles Strom has been allotted on the Quinaielt Reservation allotment No. 427 described as:

> Lot 1 and the Northeast Quarter of the Northwest Quarter of Section 30, Township 23 North, Range 10, W. W. M. in Grays Harbor County, Washington, consisting of 86.20 acres,

and trust patent therefor was issued to the said Charles Strom on September 29, 1926. Flora Strom is the holder of allotment No. 322 on the Quinaielt Reservation consisting of the:

> West one-half of the Southeast Quarter of Section 14, Township 23 North, Range 11, W. W. M. in Grays Harbor County, Washington, consisting of 80 acres,

and trust patent to her, covering said allotment was issued on September 29, 1926. Said allotments No. 427 and 322 are shown on Joint Exhibit No. 6-F hereto attached and made a part hereof.

18. The monies received by petitioners from

fishing operations, during the year 1941, were not taken under control by the Indian Service of the United States of America nor by any of its officials. Said petitioners had the full and unrestricted right and privilege of expending such funds as they saw fit without any supervision whatever by the officials of said Indian Agency or any other officials of the United States of America.

19. There are at present approximately 948 Indians who have Tribal rights in the various tribes to which the Quinaielt Indian Reservation has been allocated, residing outside of the reservation. Approximately 924 Indians who have such Tribal rights reside uon said reservation, according to the records of the office of the United States Indian Service and the office of the Superintendent thereof at Hoquiam, Washington. Substantially this same number existed in the year 1941 and the proportion living on and off the reservation was approximately the same.

20. The Quinaielt Indian Reservation is largely timbered. It is not adapted to grazing or to farming. Only about ½ of 1 percent of the Indians engage in grazing or farming operations on said reservation. Most of the members of said tribe who reside upon the reservation live in the Indian village at Taholah. The Quinaielt and allied tribes residing on said reservation are known as 'fish-

eating Indians", and the principal means of livelihood of said Indians, since time immemorial, has been principally fishing and hunting. The present living members of said tribe are the descendents of the Indian tribes with whom the treaty of July 1, 1855 was made.

21. It is further agreed and understood that either party may offer at the hearing other or further evidence on the issue presented not inconsistent with the facts stipulated herein.